SC92573

IN THE SUPREME COURT OF MISSOURI

JOHN PRENTZLER,

Respondent,

vs.

ROBIN CARNAHAN, Missouri Secretary of State, et al.,

Appellants.

Appeal from the Circuit Court of Cole County
The Honorable Daniel R. Green

BRIEF OF APPELLANTS ROBIN CARNAHAN AND THOMAS A. SCHWEICH

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JURISDICTIONAL STATEMENT

The case before the Court involves the constitutional validity of § 116.175, RSMo (2011 Cum. Supp.), to be raised on cross-appeal, along with related issues arising from a challenge to the summary statement, fiscal note and fiscal note summary for a proposed ballot initiative.[1/] Therefore, this Court has exclusive jurisdiction of the case pursuant to Article V, § 3 of the Missouri Constitution.

[1/] All references to the Missouri Revised Statutes are to the 2011 Cumulative Supplement unless otherwise specified.

STATEMENT OF FACTS

On July 7, 2011, James Bryan submitted a sample sheet for a proposed ballot initiative to the Secretary of State ("Secretary"). (Legal File "LF" – Prentzler "P" 26-30; Northcott "N" 23-27; Francis "F" 25-29; Reuter "R" 121-25).[2/] The proposed ballot initiative at issue was the third version of several similar versions submitted for potential circulation. (LF P26; N23; F29; R121). It contains numerous provisions amending Chapters 367 and 408 of the Revised Statutes of Missouri. The purpose of the proposed changes is set out in the new § 408.100.1:

> It is the intent of the people of Missouri to prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans, which have typically carried triple-digit interest rates as high as three hundred percent annually or higher, from charging excessive fees and interest rates that can lead families into a cycle of debt . . . .

[2/] For convenience, references to the Legal File will include references to the Legal File for the four related cases before the Court: *Prentzler*, SC92573; *Northcott*, SC92500; *Francis*, SC92571; and *Reuter*, SC92574.

(LF P28; N25; F26; R123).

A. Preparation of the Secretary's summary statement.

After the sample sheet for the proposed ballot initiative was approved as to form, the Secretary prepared a summary statement to be included in the official ballot title. The Secretary's summary statement for the proposed ballot initiative is as follows:

> Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

(LF P49; N44; F50; R15). The Secretary transmitted the proposed summary statement to the Attorney General for approval. (LF P32; N70; F48; R40). And the Attorney General approved the summary statement. (LF P50; N45; F49; R40).

B. Preparation of the Auditor's fiscal note and fiscal note summary.

The State Auditor ("Auditor") received the proposed ballot initiative from the Secretary and then prepared the fiscal note and fiscal note summary following the processes and procedures outlined in § 116.175. (LF P33-47; N46-62; F30-47; R33; Plaintiffs' Ex. 10, pp. 3-4). In preparing the fiscal note,

the Auditor sent copies of the proposed ballot initiative to various state and local governmental entities requesting that the entities review the same and provide information regarding the entities' estimated costs or savings, if any, for the proposed ballot initiative. *Id.* The proposed ballot initiative was sent to all state governmental entities that the Auditor has on file. *Id.* A selection of local governmental entities was also chosen to solicit their input. The Auditor selected local governmental entities based on geography, population, and type of government, in order to get a good cross-section of local governments that might be affected by the proposal. *Id.*

During the Auditor's process for preparing a fiscal note, proponents or opponents may also submit fiscal impact statements. (LF P34; N49; F32; Plaintiffs' Ex. 10, pp. 3-4). Dr. Joseph Haslag, an opponent of the proposed ballot initiative in this case, submitted a proposed statement of fiscal impact to the Auditor. (LF P34; N49; F32; Plaintiffs' Ex. 7). Section 116.175 allows an opponent of a ballot initiative to submit such a fiscal impact statement to the Auditor within ten days of the Auditor receiving the proposed ballot initiative from the Secretary. No other opponent, and no proponents, submitted a proposed statement of fiscal impact. (LF P34; N49; F32; Joint Ex. 3).

The Auditor then reviewed the submissions of the state and local governmental entities, along with Dr. Haslag's submission, for completeness

and reasonableness. *Id.* Within the 20-day window allotted to him by § 116.175.2, the Auditor took into account all submissions and wrote the fiscal note summary – 50 words or less – based on the fiscal note responses, and returned the fiscal note and fiscal note summary to the Secretary. (LF P51-52; N46; R33). The Auditor's fiscal note summary for the proposed ballot initiative is as follows:

> State governmental entities could have annual lost revenue estimated at $2.5 to $3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

(LF P52; N62; F50; R33; Joint Ex. 3).

Having received the approved fiscal note and fiscal note summary, the Secretary certified the official ballot title, which included the Secretary's summary statement and the Auditor's fiscal note summary. (LF P48-49; N44; F50; R33).

C. Opponents file four separate lawsuits which were tried on a common record.

Four separate lawsuits were then filed by opponents of the ballot initiative in the Circuit Court of Cole County, challenging the Secretary's summary statement and the Auditor's fiscal note and fiscal note summary. Though the cases were not consolidated, the trial court tried the cases in a single hearing and on a common record. (LF P5; N4; F5; R8).

At trial, Auditor employee Jon Halwes ("Halwes") testified that the fiscal note at issue consisted of two parts: (1) the fiscal note and (2) the fiscal note summary at the end of the fiscal note. (Tr. 17-18).[3/] He stated that he followed the Auditor's usual processes and procedures in complying with § 116.175 as he developed the fiscal note and fiscal note summary. (Tr. 13, 21, 716-77). Halwes further testified that he did not conduct an independent analysis of what the effect of capping interest rates was on § 408.510 lenders (hereinafter "510 lenders"). (Tr. 36). He testified, however, that he listed verbatim in the fiscal note all the information given to him during the 20 days allowed to prepare the fiscal note and fiscal note summary. (Tr. 20-21,

[3/] Unless otherwise noted, all references to the Transcript ("Tr.") are to the March 27, 2012 transcript of the joint hearing.

79; Plaintiffs' Ex. 9, p. 2 citing p. 24, lines 3-25, and p. 25, lines 1-5 of Halwes' Depo.; Plaintiffs' Ex. 10 at p. 3).

The evidence at trial showed that the only specific reference in the fiscal note to 510 lenders was an email message from the Division of Finance found at the end of Dr. Haslag's report. (Joint Ex. 3). The contents of this message were not submitted as part of the official response to the Auditor's request for fiscal impact by the Department of Insurance, Financial Institutions and Professional Registration, (Joint Ex. 3; Tr. 87), which is the parent body of the Division of Finance. (Tr. 26). Halwes testified that he considered the Division of Finance's comments concerning the impact on 510 lenders to have been evaluated and modified in the official fiscal impact submission from the Department. (Tr. 26-28, 89).

The Plaintiffs put on a witness, Dr. Thomas Durkin, who provided testimony about the fiscal impact on 510 lenders. (Tr. 172-217). Dr. Durkin acknowledged that the Plaintiffs had an opportunity to submit a proposed statement of fiscal impact focused on an analysis of 510 lenders under § 116.175, but they did not. (Tr. 210, 213-14). He also testified that "In general, I have a feeling for what 408.510 is, but I certainly wouldn't tell you that I know a whole lot about it or spent a lot of time looking at it." (Tr. 178). Finally, he acknowledged that "I don't know if anybody knows, exactly what the distribution of companies is." (Tr. 187). And "I accepted someone's oral

representation on approximately how many employees there are in the 510 industry." (Tr. 208).

After taking the case under submission, the trial court issued a single judgment (and eventually a second amended judgment), in all four cases. (LF P199-206; N287-94; F199-206; R156-163). In its judgment the trial court concluded that the Secretary's summary statement, the Auditor's fiscal note, and the Auditor's fiscal note summary were all "insufficient, unfair, [and] likely to deceive petition signers and voters." Judgment, p. 7. The sole reason for rejecting the Secretary's summary statement was that instead of providing the specific interest rate limit, the summary statement provided that the ballot initiative would "limit the annual rate of interest." Judgment, pp. 4-5. The trial court further held that it "must rewrite" the Secretary's summary statement. Judgment, p. 5. The trial court's sole reason for rejecting the fiscal note and fiscal note summary as "defective" was the supposed "complete omission of any fiscal impact that the initiative would have on the '510' lenders." Judgment, p. 7, n 1.

POINTS RELIED ON

I. The Trial Court Erred in Entering Judgment That the Secretary's Summary Statement is Insufficient and Unfair, Because Voters Will Not be Deceived nor Misled by a Summary Statement That is in Fact True, In That More Specificity is Not Required When the Summary Statement Already Describes the Subject of the Proposal.

Bergman v. Mills,

988 S.W.2d 84 (Mo. App. W.D. 1999)

Missourians Against Human Cloning v. Carnahan,

190 S.W.3d 451 (Mo. App. W.D. 2006)

United Gamefowl Breeders Ass'n of Missouri v. Nixon,

19 S.W.3d 137 (Mo. banc 2000)

II. The Trial Court Erred in Entering Judgment That the "Court Must Rewrite the Summary Statement," Because Courts are Not Authorized to Rewrite Summary Statements, In That Missouri Statutes Authorize Only the Secretary of State to Summarize a Proposed Ballot Initiative.

Mo. Coalition for Env't v. Joint Comm. on Admin. Rules,

948 S.W.2d 125 (Mo. banc 1997)

Mo. Const. Art. IV, § 12

III. The Trial Court Erred in Entering Judgment That the Fiscal Note and Fiscal Note Summary are Insufficient and Unfair, Because the Court Erroneously Applied the Law, In That § 116.175 Requires Opponents and Proponents to Submit Comments Within 10 Days of the Auditor's Receipt of the Proposed Ballot Initiative From the Secretary of State and Requires the Auditor to Prepare the Fiscal Note and Summary Within 20 Days and the Fiscal Impact Evidence Relied Upon by the Trial Court was Never Presented to the Auditor Within the Statutory Period.

Missouri Mun. League v. Carnahan,

--- S.W.3d ----, 2011 WL 3925612 (Mo. App. W.D. 2011)

Missouri Mun. League v. Carnahan,

303 S.W.3d 573, 579–80 (Mo. App. W.D. 2010)

§ 116.175, RSMo.

IV. The Trial Court Erred in Entering Judgment That the Fiscal Note and Fiscal Note Summary are Insufficient and Unfair, Because There was No Substantial and Competent Evidence That They Were Insufficient and Unfair, In That

the Auditor Fully, Completely, and Accurately Listed All Fiscal Comments Received in the Statutory Period Under § 116.175 and Properly Summarized the Comments.

Missouri Mun. League v. Carnahan,

303 S.W.3d 573, 579-80 (Mo. App. W.D. 2010)

§ 116.175, RSMo

V. The Trial Court Erred in Entering Judgment that the Fiscal Note and Fiscal Note Summary are Insufficient and Unfair, Because There was No Substantial Evidence to Support the Judgment, In That the Opponents' Evidence Did Not Identify Any Lenders That Would be Affected by the Ballot Initiative Who Were Not Already Considered in the Fiscal Note and Fiscal Note Summary.

SUMMARY OF THE ARGUMENT

One must ask, after reading the trial court's second amended judgment, what standard is the court applying: does a summary statement have to contain the "main points," a "material change," or must it be "material and substantive?" Judgment, pp. 3-4. Actually, none of these verbal formulations by the trial court are the standard. The standard is notice and not deceiving voters.

The purpose of the ballot title " 'is to give interested persons notice of the subject of a proposed [law] to prevent deception through use of misleading titles. If the title gives adequate notice, the requirement is satisfied.' " *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. App. W.D. 2006)) (quoting *Union Elec. Co. v. Kirkpatrick*, 606 S.W.2d 658, 660 (Mo. banc 1980)). Furthermore, "Even if [a plaintiffs'] substitute language would provide more specificity and accuracy in the summary 'and even if that level of specificity might be preferable' " this is not the test. *Missourians Against Human Cloning*, 190 S.W.3d at 457 (quoting *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. App. W.D. 1999)).

For the Secretary's summary statement, the trial court decided that more specificity in the form of the exact interest rate was the "centerpiece" of the entire proposal. That is not true. The Secretary accurately gave notice of the "subject" of the proposed law – "limit the annual rate of interest" – and

although the trial court may prefer more specificity, it is not required. Moreover, even if the Secretary's summary statement were unfair or inadequate, separation of powers principles provide that the Secretary, not the courts, rewrite the summary statement. Thus, the trial court's holding that it "must rewrite the Summary Statement," as well as its holding that the Secretary's summary statement is unfair and insufficient, should be reversed.

The trial court's ruling that the fiscal note and fiscal note summary are insufficient and unfair is also erroneous. First, § 116.175 and current case law out of the Missouri Court of Appeals, Western District, strongly support the logical position that the sufficiency and fairness of the fiscal note is to be judged on the basis of the information provided to the Auditor during the 20-day window to prepare a fiscal note, and only that information. To require otherwise invites mischief and delay in the initiative process moving forward in an orderly fashion because opponents of an initiative petition could withhold fiscal information from the Auditor only to present it later at trial. That is what occurred in this case when Plaintiffs put on Dr. Thomas Durkin at trial to render his opinion about the alleged impact of the initiative petition on installment lenders defined under § 408.510. Dr. Durkin's opinion on fiscal impact was not presented to the Auditor during the preparation of the fiscal note. The trial court incorrectly applied the law by considering and

giving weight to Dr. Durkin's testimony on the issue of the sufficiency and fairness of the fiscal note and fiscal note summary.

Second, the fiscal note in this case is sufficient and fair since it accurately and fairly includes the submissions received by the Auditor pursuant to § 116.175. There is absolutely no evidence of bias (unfairness) in the way the information is presented in the fiscal note. The only issue is adequacy (or sufficiency) of the fiscal note due to the supposed lack of analysis on the issue of fiscal impact on the 510 lenders. However, the finding that there was a "complete omission of any fiscal impact that the initiative would have on the '510' lenders" is not supported by substantial evidence. In fact, the record shows that 510 lenders were considered in the submission of the Department of Insurance, Financial Institutions and Professional Registration.

Third, the trial court erroneously applied the law in finding the fiscal note summary insufficient and unfair by considering information presented after the fiscal note was drafted, *e.g.*, the trial testimony of Dr. Durkin. Existing case law and § 116.175, strongly support the position that the sufficiency and fairness of the fiscal note summary is based on the contents of the fiscal note. To hold otherwise undermines the process and allows opponents to lay in wait or "sandbag" until after a ballot initiative's title has been approved and circulated for signatures.

And, even if Dr. Durkin's testimony is considered, it is not substantial evidence about the fiscal impact on state and local government costs or savings. Dr. Durkin's analysis on 510 lenders and lost revenue is based on an unknown numbers of lenders. Plaintiffs have the burden of proving that no fiscal impact evidence concerning 510 lenders was considered in the fiscal note and that the fiscal impact was significant enough to affect the fiscal note summary. As discussed above, 510 lenders were considered by the Department of Insurance, Financial Institutions and Professional Registration, and were listed in the fiscal note. Dr. Haslag's submission discussed fiscal impact on payday loan and title lenders. Plaintiffs never presented testimony on who the 510 lenders are (other than being lenders covered under § 408.510) or whether they include lenders other than the payday and title loan companies already considered in Dr. Haslag's analysis included in the fiscal note. The trial court erroneously found that Dr. Durkin's testimony provided substantial evidence that the fiscal impact on 510 lenders was excluded and that there would be increased costs to state and local governments other than that already provided in the fiscal note and fiscal note summary.

For all of these reasons, the trial court's judgment on the sufficiency and fairness of the summary statement and the fiscal note and fiscal note summary should be reversed.

ARGUMENT

Standard of Review

As with any court-tried case, the trial court's judgment in a ballot initiative case should be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Missouri Mun. League v. Carnahan*, --- S.W.3d ----, 2011 WL 3925612, *2 (Mo. App. W.D. 2011) ("*MML II*") (citing *Murphy v. Carron,* 536 S.W.2d 30, 32 (Mo. banc 1976)). Plaintiffs fail under each of these standards.

When considering the Secretary's summary statement, "the only question on appeal is whether the trial court drew the proper legal conclusions, which [courts] review[] *de novo*." *MML II*, 2011 WL 3925612, *2 (citing *Overfelt v McCaskill,* 81 S.W.3d 732, 735 (Mo. App. W.D. 2002) and *Missouri Mun. League v. Carnahan,* 303 S.W.3d 573, 579–80 (Mo. App. W.D. 2010) ("*MML I*")). Likewise, in reviewing the arguments related to the process followed by the Auditor in preparing the fiscal note and fiscal note summary, the trial court's legal conclusions and application of the law to the facts are reviewed without deference to the trial court's conclusions. *Missouri Municipal League v. Carnahan*, 303 S.W.3d at 579-580, citing *Coyle v. Dir. of Revenue*, 181 S.W.3d 62, 64 (Mo. banc 2005).

I. The Trial Court Erred in Entering Judgment That the Secretary's Summary Statement is Insufficient and Unfair, Because Voters Will Not be Deceived nor Misled by a Summary Statement That is in Fact True, In That More Specificity is Not Required When the Summary Statement Already Describes the Subject of the Proposal.

Chapter 116, RSMo, sets forth the procedures for circulation and submission of an initiative petition, as well as the standards for review of the summary statement prepared by the Secretary of State. After approval as to form, the Secretary has 10 days to prepare a summary statement for a proposed ballot initiative, which cannot exceed 100 words. § 116.334, RSMo. Critically, the Secretary's summary statement must use "language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure." § 116.334. The Secretary did just that in preparing the summary statement in this case. The trial court, however, did not follow the statutory standard, but instead established a new and unsupported standard.

According to the trial court, it is not sufficient that the Secretary's summary statement be true or that it summarizes the subject of the proposal. Instead, it must also include what the trial court believes are the "main points," a "material change," or a summary of changes that are "material and

substantive." Judgment, pp. 3-4. This is not the standard, and in this case its application turned what is unquestionably a true summary statement into a summary that, according to the trial court, is supposedly "misleading and likely to deceive petition signers and voters." Judgment, p. 4. The trial court, therefore, should be reversed.

A. Legal standards applicable to the Secretary's summary statement.

In reviewing a summary statement for a ballot initiative, the burden is on the opponents of a summary statement to show that the language is "insufficient or unfair." § 116.190.3. Insufficient and unfair means "to inadequately and with bias, prejudice, deception, and/or favoritism state the consequences of the [initiative]." *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. App. W.D. 1994). As such, the test is "whether the language fairly and impartially summarizes the purposes of the measure so that voters will not be deceived or misled." *Bergman v. Mills*, 988 S.W.2d at 92.

The Secretary should prepare a summary statement that endeavors to promote an informed understanding of the probable effect of a proposed amendment. *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. App. W.D. 2008). "[W]hether the summary statement prepared by the Secretary of State is the best language for describing the [initiative] is not the test." *Bergman*, 988 S.W.2d at 92. Indeed, as the court of appeals has noted, "[i]f

charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher v. Carnahan*, 268 S.W.3d 427, 431 (Mo. App. W.D. 2008).

One of the other more comprehensive appellate decisions to address the standard for reviewing ballot summary language is *Missourians Against Human Cloning*, 190 S.W.3d 451. In that case, the court described the process and the applicable standards as follows:

> Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation … Courts are understandably reluctant to become involved in pre-election debates over initiative proposals. Courts do not sit in judgment on the wisdom or folly of proposals.

Id. at 456 (citing *Missourians to Protect the Initiative Process v. Blunt*, 799 S.W.2d 824, 827 (Mo. banc 1990)). Furthermore, the purpose of the ballot title " 'is to give interested persons notice of the subject of a proposed [law] to prevent deception through use of misleading titles. If the title gives adequate

notice, the requirement is satisfied.' " *Missourians Against Human Cloning*, 190 S.W.3d at 456 (quoting *Union Elec. Co.*, 606 S.W.2d at 660).

The *Missourians Against Human Cloning* decision also emphasized that § 116.190 does not require the Secretary's summary statement to be the most specific or preferable summary for a particular initiative: "Even if [a plaintiffs'] substitute language would provide more specificity and accuracy in the summary 'and even if that level of specificity might be preferable' " this is not the test. *Id.* (quoting *Bergman*, 988 S.W.2d at 92). Here, the trial court violated this test and simply used language that it felt provided more specificity.

B. The Secretary's summary statement is sufficient and fair.

The Secretary's summary statement language fairly and impartially sets out the purposes of the ballot initiative. The ballot initiative's stated purpose in this case is to "prevent lenders, such as those who make what are commonly known as payday loans, car title loans, and installment loans … from charging excessive fees and interest rates that can lead families into a cycle of debt by: . . . reducing the annual percentage rate . . . ." (LF P28; N25; F26; R123, § 408.100.1 of sample initiative petition). The ballot initiative continues by specifically providing for "[r]educing the annual percentage rate for" these loans and that the interest rate "shall not exceed an annual

percentage rate." (LF P28; N25; F26; R123, § 408.100.1(1) and .2 of sample initiative petition). Therefore, the Secretary's summary statement provides as follows:

> Shall Missouri law be amended to limit the annual rate of interest, fees, and finance charges for payday, title, installment, and consumer credit loans and prohibit such lenders from using other transactions to avoid the rate limit?

(LF P32; N44; F50; R41) (emphasis added).

At no point does the trial court state that this summary is not actually true or that it does not summarize the subject of the ballot initiative. Despite accurately stating that the proposed initiative petition would "limit the annual rate of interest" for payday, title, installment, and consumer credit loans, the trial court held that the summary statement missed the "centerpiece" of the proposal. That supposed "centerpiece" is not that it would limit the rate of interest, but that the limit is 36%. According to the trial court, the summary is "misleading and likely to deceive petition signers and voters" without this detail.

As *Missourians Against Human Cloning* instructs, however, the important test is whether the language gives "notice of the subject of a proposed [law] to prevent deception through use of misleading titles." 190

S.W.3d at 456 (emphasis added). That is what the Secretary's summary statement does by stating the amendment would "limit the annual rate of interest." There is no "bias, prejudice, deception and/or favoritism" in the Secretary's language and the language "makes the subject evident with sufficient clearness to give notice of the purpose to those interested or affected by the proposal." *Cures Without Cloning*, 259 S.W.3d at 81. The Secretary "need not set out the details of the proposal." *Missouri Municipal League*, 303 S.W.3d at 586 (citing *United Gamefowl Breeders Ass'n of Missouri v. Nixon*, 19 S.W.3d 137, 141 (Mo. banc 2000)).

While the Plaintiffs and the trial court may prefer more detail, the standard for a summary statement is to give notice of the subject and purpose of the proposal to those interested in or affected by the proposal. *United Gamefowl Breeders*, 19 S.W.3d at 140-41. The Secretary's summary statement meets the requirements of fairness and sufficiency. It does not need to provide greater specificity by identifying the specific interest rate. Accordingly, the trial court should be reversed.

II. The Trial Court Erred in Entering Judgment That the "Court Must Rewrite the Summary Statement," Because Courts are Not Authorized to Rewrite Summary Statements, In That Missouri Statutes Authorize Only the Secretary of State to Summarize a Proposed Ballot Initiative.

Even if the trial court was right that the Secretary's summary statement is likely to deceive voters by stating that it limits the interest rate instead of giving the exact interest rate cap, the court still erred by holding that it "must rewrite the Summary Statement." This action is unsupported by Missouri law and constitutes a violation of separation of powers.

There has developed in the ballot initiative context an encroachment by the judiciary on the constitutional and statutory powers of the Secretary of State to draft ballot initiative language. The Secretary acknowledges the decision in *Cures Without Cloning*, 259 S.W.3d at 83, which declares that § 116.190, "implicitly allows the court to certify a corrected summary statement, and then 'the secretary of state shall certify the language which the court certifies to [her].' " Yet, the Secretary respectfully suggests that this authority is inconsistent with the Constitution and laws of Missouri.

The Missouri Constitution bestows upon the Secretary the authority to submit all initiatives or referendum petitions to the people. *See* Mo. Const.

Art. III, § 53. Section 116.334 explicitly requires the Secretary to prepare a summary statement for a ballot initiative measure – and no one else. No provision of the Missouri Constitution or Chapter 116 permits a court to modify a summary statement prepared by the Secretary. And courts may not interfere with, or attempt to control, the exercise of discretion by the executive department in those areas where the law vests such right to exercise discretion with the executive branch of government. *See State ex rel. Mo. Highway Transp. Comm'n v. Pruneau*, 652 S.W.2d 281, 289 (Mo. App. S.D. 1983).

A. Courts are without authority to modify summary statements.

The trial court exceeded its authority, in violation of the doctrine of separation of powers, when it modified the summary statement prepared by the Secretary rather than remanding to her for correction. Art. II, § 1 of the Missouri Constitution states:

> The powers of government shall be divided into three distinct departments – the legislative, executive and judicial – each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise

> any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

The Secretary is a constitutional officer within the executive department and shall perform such duties "in relation to elections … as provided by law." Mo. Const. Art. IV, § 12 and § 14. The Missouri Constitution and statutes give the Secretary a special role in relation to initiative petitions. Under Art. III, § 53, the Secretary and other executive officers are tasked with "submitting" all initiative and referendum petitions to the people, with the legislature limited to making "general laws" to govern the Secretary and any such other officers in this function.

Article XII, concerning amendments to the Constitution, sheds further light on the scope of the Secretary's role in "submitting" initiatives to the people. Article XII, § 2(b) provides that all constitutional amendments by initiative petition must be "submitted … by official ballot title as may be provided by law." Chapter 116 commits to the Secretary considerable discretion in formulating particular ballot titles for initiatives and referendums; her work is confined only by the broad parameters of the "insufficient" or "unfair" standard described previously. *See Missourians Against Human Cloning*, 190 S.W.3d at 457.

The "sole exception to the unbending rule" of separation of powers exists only in instances "expressly directed or permitted" by the Missouri Constitution. *Mo. Coalition for Env't v. Jt. Comm. on Admin. Rules,* 948 S.W.2d 125, 133 (Mo. banc 1997). But Missouri courts have not been expressly directed or permitted to write or rewrite ballot summary language under the Missouri Constitution. Indeed, even the court of appeal's decision in *Cures Without Cloning*, recognized that at best the authority to rewrite is "implicit[]." *Cures Without Cloning*, 259 S.W.3d at 83. "The judicial power granted to the courts by the constitution is the power to perform what is generally recognized as the judicial function – the trying and determining of cases in controversy." *State ex rel. Pulitzer Pub. Co. v. Coleman*, 152 S.W.2d 640, 646 (Mo. banc 1941). When a court actively rewrites a summary statement, rather than remanding to the Secretary for revision, it in effect mandates that the Secretary write the summary in one specific way, when many other ways of writing the summary would themselves be fair and sufficient.

Missouri courts have long recognized that infringing on the discretion afforded to an executive officer violates the bedrock principle of separation of powers. The power and authority of the government in this country is vested in distinct, coordinate departments – legislative, executive and judicial – and the judicial department may not control or coerce the action of the other two

within the sphere allotted to them by the fundamental law, for the exercise of judgment and discretion. *Comm'n Row Club v. Lambert*, 161 S.W.2d 732, 736 (Mo. App. E.D. 1942); *see also, e.g., Pruneau,* 652 S.W.2d 281. Missouri courts similarly recognize that they cannot usurp the functions of other branches of government when ordering relief. For example, while "[c]ourts obviously have the power to declare a legislative enactment void or invalid as contrary to constitutional mandates, … they cannot take the further step of ordering … [anything that] is, in essence, legislating, which is not the function of a court." *Treme v. St. Louis County*, 609 S.W.2d 706, 710 (Mo. App. E.D. 1980).

Section 116.190 provides that "[i]nsofar as the action challenges the summary portion of the official ballot title, the court shall consider the petition, hear arguments, and in its decision certify the summary statement portion of the official ballot title to the secretary of state." This mandate must be read in harmony with separation of powers principles. As "certify" is not defined in Chapter 116, the plain and ordinary meaning prevails. *Gash v. Lafayette County*, 245 S.W.3d 229, 232 (Mo. banc 2008). "Certify" is defined as "To attest as being true or as meeting certain criteria." Black's Law Dictionary 241 (8th ed. 2004). Consistent with the doctrine of separation of powers and the definition of "certify," the court's authority and remedy under § 116.190 is limited to certifying those portions of the Secretary's summary it

believes are fair and sufficient, with a remand to the Secretary to rewrite those portions that cannot be certified. "If the ballot challenge is timely filed, the court is authorized to do no more than certify a correct ballot title." *Missourians to Protect the Initiative Process*, 799 S.W.2d at 829 (Mo. banc 1990).

Two opinions have been issued by the court of appeals that indicate a court has the authority to modify or rewrite a summary statement. In light of the above analysis, those decisions should not be followed. In *Overfelt*, 81 S.W.3d at 736, the court stated that "Section 116.190 allows the trial court to correct any insufficient or unfair language of the ballot title and to certify the corrected official ballot title to the secretary of state." In *Cures Without Cloning*, the court cited to the *Overfelt* case and declared that § 116.190 "implicitly allows the court to certify a corrected summary statement, and then 'the secretary of state shall certify the language which the court certifies to [her].' " *Cures Without Cloning*, 259 S.W.3d at 83. However, this Court has established that "the Legislature can neither add to nor subtract from the constitutional powers of a court." *State ex rel. York v. Locker*, 181 S.W. 1001, 1002 (Mo. banc 1915).

The court of appeal's interpretation of § 116.190 in *Overfelt* and *Cures Without Cloning*, based on implicitness, flies in direct contrast to the plain language of the statute and ignores the lack of any authority in the Missouri

Constitution permitting a court to rewrite a summary statement. Without being expressly directed or permitted to rewrite or modify a summary statement by the Missouri Constitution, the trial court's interpretation of § 116.190 should be reversed. *Mo. Coalition for Env't v. Jt. Comm. on Admin. Rules,* 948 S.W.2d at 133.

B. Courts should show deference to the Secretary's constitutional and statutory authority by remanding instead of rewriting.

Moreover, the Secretary is the chief elections officer of the State. Mo. Const. Art. IV, § 14. Her authority over, and responsibility for, elections generally and the initiative and referendum process specifically are set out in Chapters 115 and 116 of the Revised Statutes of Missouri. And, as noted above, the Missouri Constitution entrusts the Secretary with the authority to submit all initiatives or referendum petitions to the people. Mo. Const. Art. III, § 53. Chapter 116 gives her overarching responsibility for the ballot initiative process. She is charged not only with preparing summary statements, but also with overseeing the ballot initiative process as a whole. She approves the petition as to form, verifies signatures through local election authorities, and certifies petitions as sufficient for the ballot.

The statutes grant the Secretary considerable discretion in her role as overseer of initiatives, and the case law reiterates this need for deference

when reviewing challenges to the language of a summary statement. *See, e.g., Bergman,* 988 S.W.2d at 92. This deference due the Secretary parallels that given to administrative agencies when the courts review their interpretation of a constitutional or statutory provision they are responsible to administer. *See State ex rel. Curators of the Univ. of Mo. v. Neill*, 397 S.W.2d 666, 670 (Mo. banc 1966) ("The administrative interpretation given a constitutional or statutory provision by public officers charged with its execution, while not controlling, is entitled to consideration, especially in cases of doubt or ambiguity").

The need for deference is great when dealing with an elected executive official. Indeed, the "responsibility for assessing the wisdom of [reasonable] policy choices and resolving the struggle between competing views of public interest are not judicial ones," but are left to the political branches. *Moses v. Carnahan*, 186 S.W.3d 889, 903 (Mo. App. W.D. 2006). As long as the Secretary's judgment is reasonable, the courts should not find insufficiency or unfairness and replace her judgment with theirs.

The history of this case further demonstrates the need for deference to the Secretary's constitutional and statutory authority. Numerous plaintiffs and the trial court have all viewed the ballot initiative proposal and summaries differently, with each concluding that a different summary statement should be used. The trial court found the language unfair and

insufficient and changed it. This Court could certainly disagree and change the language again. In fact, the court of appeals astutely observed that "If charged with the task of preparing the summary statement for a ballot initiative, ten different writers would produce ten different versions," and "there are many appropriate and adequate ways of writing the summary ballot language." *Asher*, 268 S.W.3d at 431. In the end, ballot initiative summary language would fall to this Court to be written or re-written as a matter of last resort. This is simply not consistent with the Missouri Constitution, statutes, or bedrock principles of separation of powers.

III. The Trial Court Erred in Entering Judgment That the Fiscal Note and Fiscal Note Summary are Insufficient and Unfair, Because the Court Erroneously Applied the Law, In That § 116.175 Requires Opponents and Proponents to Submit Comments Within 10 Days of the Auditor's Receipt of the Proposed Ballot Initiative from the Secretary of State and Requires the Auditor to Prepare the Fiscal Note and Summary Within 20 Days and the Fiscal Impact Evidence Relied Upon by the Trial Court was Never Presented to the Auditor Within the Statutory Period.

The Court's role in initiative petition cases is limited. Where opponents of a measure bring suit, the Court should give great deference to the State's

efforts. *See, e.g., Missourians Against Human Cloning*, 190 S.W.3d at 456 ("Our role is not to act as a political arbiter between opposing viewpoints in the initiative process: When courts are called upon to intervene in the initiative process, they must act with restraint, trepidation, and a healthy suspicion of the partisan who would use the judiciary to prevent the initiative process from taking its course."). "Courts do not sit in judgment on the wisdom or folly of proposals." *See Missourians to Protect the Initiative Process*, 799 S.W.2d at 827.

Challengers to a fiscal note and fiscal note summary, such as Plaintiffs in this case, "bear the burden of demonstrating in the first instance that the Auditor's fiscal note and fiscal note summary are insufficient or unfair." *Missouri Municipal League*, 303 S.W.3d 573 at 582 (citing *Cures Without Cloning* , 259 S.W.3d at 81). Again, the court in *Hancock*, 885 S.W.2d at 49, declared that "the words insufficient and unfair as used in section 116.190.3, and applied to the fiscal note mean to inadequately and with bias, prejudice, deception and/or favoritism state the fiscal consequences of the proposed proposition." The court also held that "[a]s applied to the fiscal note summary, insufficient and unfair means to inadequately and with bias, prejudice, deception and/or favoritism synopsise in [50] words or less, the fiscal note." *Id.*

The purpose of a fiscal note is to inform the public of the fiscal consequences of a proposed measure. § 116.175.1. So long as the fiscal note conveys the fiscal consequences to the public adequately and without bias, prejudice, deception, or favoritism, the Auditor has met his responsibilities under the statute. *Hancock*, 885 S.W.2d at 49. All the details of a fiscal note need not be set out in a fiscal note summary consisting of a mere 50 words. *Missouri Municipal League*, 303 S.W.3rd at 583 (citing *Bergman,* 988 S.W.2d at 92).

Section 116.175, provides the sole means by which a fiscal note and a fiscal note summary are prepared by the Auditor. Section 116.175.1 imposes a duty upon the Auditor to "assess the fiscal impact of a proposed measure." Subsection 1 goes on to describe the process by which the Auditor may gather information to assess the fiscal impact of a measure. Section 116.175.1 states:

> [T]he auditor shall assess the fiscal impact of the proposed measure. The state auditor may consult with the state departments, local government entities, the general assembly and others with knowledge pertinent to the cost of the proposal. Proponents or opponents of any proposed measure may submit to the state auditor a proposed statement

> of fiscal impact . . . provided that all such proposals are received by the state auditor within ten days of his or her receipt of the proposed measure from the secretary of state.

The court of appeals has described this process in detail, explaining that the Auditor can solicit feedback from various state and local entities, then "[t]he Auditor's normal policy and procedure is to include verbatim the submissions of state and local government entities and proponents and opponents of the proposal." *Missouri Municipal League,* __S.W.3d__, 2011 WL 3925612, at page 5. The process provided in § 116.175.1, which has been upheld by the court of appeals, does not at any point require the Auditor to summarize or explain his analysis. *Missouri Municipal League,* __S.W.3d__, 2011 WL 3925612; *Missouri Municipal League*, 303 S.W.3d 573.

Here, the evidence shows that the submissions of fiscal impact contained in the fiscal note are listed verbatim as received from the submitting entities or individuals. (Tr. 20, 79; Plaintiffs' Ex. 9, p. 2 citing p. 24, lines 3-25, and p. 25, lines 1-5 of Halwes' Depo.; Plaintiffs' Ex. 10 at p. 3). In those submissions, there is supporting material for the Auditor's statements in the fiscal note summary. The court of appeals has repeatedly upheld this process for drafting fiscal notes. *See Missouri Municipal League,*

__S.W.3d__, 2011 WL 3925612, at pages 7-8; *Missouri Municipal League*, 303 S.W.3d at 582.

In *Missouri Municipal League,* Plaintiffs claimed that the Auditor had failed to "independently assess" the fiscal impact of proposed measures when he compiled comments from government entities and, after reviewing them for "reasonableness and completeness," transcribed them verbatim into the fiscal note. The court of appeals disagreed. 303 S.W.3d at 582. It held that the plain language of the statute does not mandate that the Auditor adopt another method, and found the current process adequate to satisfy statutory requirements. *Id.* Subsequently, in *Missouri Municipal League,* the same Plaintiffs tried a different tack, and argued that the Auditor's process must first be promulgated as rules. The court disagreed again. It noted the broad discretion granted the Auditor, for instance that he "*may* consult with state departments, local governmental entities, the general assembly and others with knowledge pertinent to the cost of the proposal." (emphasis in original), citing § 116.175.1. The court held: "The fact that the Auditor goes through a standard process to prepare fiscal notes and fiscal note summaries does not transform this discretionary role into one that must be formalized through rules and rulemaking procedures." *Id.*

Plaintiffs seek to challenge the sufficiency and fairness of the fiscal note by asserting that the Auditor had to go outside the submissions he

received and do his own independent analysis and research on the effect of capping the loan rate on 510 lenders as proposed in the initiative petition. (Tr. 36).[4/] As the court of appeals has noted in the two *Missouri Municipal League* cases, all the Auditor is required to do is to compile information he receives from state agencies, local governmental entities and proponents and opponents of a measure.

The process provided in § 116.175.1 does not at any point require the Auditor to look at factors not brought to his attention in the submissions on possible fiscal impact from state agencies, local governmental bodies, proponents or opponents that he receives in the 20-day period he has to prepare a fiscal note and fiscal note summary. Nothing in § 116.175 requires the Auditor to inquire into the background information used by an entity; in fact, the timeline granted to the Auditor to create a fiscal note and fiscal note summary effectively prevents it. It was the clear intent of the legislature in adopting § 116.175, and the court of appeals' decisions in the *Missouri Municipal League* cases, that the Auditor is only responsible for reviewing

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[4/] Nothing in the record defines the specific categories of 510 lenders. However, Dr. Durkin testified and referred to lenders governed under § 408.510. Who those lenders are and whether they include payday loan and car title lenders is unknown from the record in this case.

individual submissions for "completeness and reasonableness" and does not require that the Auditor check to make sure the information provided is the best possible analysis. The legislature's action in creating a 20-day deadline for a fiscal note and fiscal note summary establishes that reasonableness, rather than precision, was their intent for the Auditor's work.

Not only is Plaintiffs' assertion of a duty by the Auditor to pursue independent analysis unsupported and contrary to existing case law, but it also leads to the very danger cited in the *Missourians Against Human Cloning* and *Missourians to Protect the Initiative Process*. That danger being, the turning of the process into a partisan wrangle in the courtroom instead of leaving it to a public campaign to persuade voters. The record in this case reveals that danger fully.

Plaintiffs brought in a witness, Dr. Durkin, some 253 days after the time for the Auditor to receive proposed fiscal impact statements for inclusion and assessment in the fiscal note. (Tr. 1, 207). To allow this would invalidate a fiscal note based on information provided after the creation of the fiscal note, and would mean that an opponent could sit on information in an effort to "sandbag" the fiscal note, and in effect the initiative petition. Opponents or proponents hoping to invalidate a fiscal note or delay the initiative process would merely have to hire an expert to testify at trial about information that was not previously provided to and assessed by the Auditor

in preparing the fiscal note. The trial court's judgment in this case gives opponents of an initiative petition an incentive not to provide information in a timely manner and creates an open opportunity for mischief.

Appellate decisions make it clear that the sufficiency and fairness of fiscal notes is based on the submissions received by the Auditor during the 20-day period under § 116.175.1, to assess the fiscal impact of an initiative petition. This is also the clear intent of the statute. The court of appeals has approved this process of compiling and transcribing submissions of fiscal impact essentially verbatim into the fiscal note, and Plaintiffs fail to show that this holding should be overturned. *Missouri Municipal League,* __S.W.3d__, 2011 WL 3925612, at pages 7-8; *Missouri Municipal League*, 303 S.W.3d at 582.

Plaintiffs had an opportunity to submit a proposed statement of fiscal impact under § 116.175, from Dr. Durkin or any other person, focused on an analysis of 510 entities, and they did not. (Tr. 210, 213-14). Section 116.175, does not allow Plaintiffs to subvert the process by not submitting such a proposed statement of fiscal impact during the Auditor's process of preparing a fiscal note and instead waiting to attack the fiscal note submission by presenting such testimony at trial. The trial court's ruling finding the fiscal note insufficient and unfair should be overturned as a matter of law.

IV. The Trial Court Erred in Entering Judgment That the Fiscal Note and Fiscal Note Summary are Insufficient and Unfair, Because There was No Substantial and Competent Evidence That They Were Insufficient and Unfair, In That the Auditor Fully, Completely, and Accurately Listed All Fiscal Comments Received in the Statutory Period Under § 116.175 and Properly Summarized the Comments.

Plaintiffs did not present any evidence proving that the fiscal note presented the information the Auditor received in a biased, prejudicial, or deceptive manner. In fact, there is no issue that the information in the fiscal note from the various sources is included as they were presented by the sources with no material changes or editing. Any reader of the fiscal note would therefore get a clear picture of how each source viewed the cost or savings of the proposed changes to payday loan interest rates. Thus, the only real issue is whether the fiscal note is adequate.

The record in this case supports the fact that the fiscal note accurately summarized the information provided to the Auditor during the 10-day period granted opponents and proponents, and the 20-day period given the Auditor to seek and receive, analyze, and assess information from state and local governmental bodies. (Tr. 20-21, 79; Plaintiffs' Ex. 9, p. 2 citing p. 24, lines 3-25, and p. 25, lines 1-5 of Halwes' Depo.; Plaintiffs' Ex. 10 at p. 3).

Plaintiffs argue, and the trial court found, that the Auditor did not consider and include in the fiscal note the effect of the initiative petition on the 510 lenders. This is not factually accurate. What the record shows is that the Auditor did not conduct an independent analysis of what the effect of capping interest rates would be on 510 lenders. (Tr. 36). However, the Auditor's employee repeatedly testified that he listed verbatim all the information given to him. (Tr. Tr. 20-21, 79; Plaintiffs' Ex. 9, p. 2 citing p. 24, lines 3-25, and p. 25, lines 1-5 of Halwes' Depo.; Plaintiffs' Ex. 10 at p. 3). As noted above, there is no requirement for the Auditor to independently assess and include that independent assessment in the fiscal note. *Missouri Municipal League,* 303 S.W.3d at 582.

In any event, there was evidence that the submission of the Department of Insurance, Financial Institutions and Professional Registration reflected its analysis as to the effect on 510 lenders. (Tr. 26-28, 87, 89). The Department's submission is included verbatim in the fiscal note. Thus, the trial court erred in finding that the fiscal note was insufficient and unfair by improperly finding against the weight of the evidence that there had been "the complete omission of any fiscal impact that the initiative would have on the '510' lenders." (Judgment, p. 7, fn 1; LF P202-09; N287-94; F199-206; R156-163).

The trial court further erred in misapplying the law since his finding would require the Auditor to include in the fiscal note his independent assessment of the impact on 510 lenders. But the law does not require an independent analysis by the Auditor. Further, the submission of the Department of Insurance reflected analysis of the 510 lender issue and was included verbatim in the fiscal note.

As for the fiscal note summary, it was prepared after the Auditor compiled and assessed the fiscal impact information contained in the fiscal note. *See* § 116.175.1 & .3; (Tr. 82-84; Plaintiffs' Ex. 9, p. 3 citing p. 25, lines 7-12 of Halwes' Depo.). It is also important to note that "the fiscal note and fiscal note summary shall state the measure's estimated cost or savings, if any, to state or local governmental entities." § 116.175.3 (emphasis added).

> The fiscal note summary in question reads:
>
> State governmental entities could have annual lost revenue estimated at $2.5 to $3.5 million that could be partially offset by expenditure reductions for monitoring industry compliance. Local governmental entities could have unknown total lost revenue related to business license or other business operating fees if the proposal results in business closures.

(Joint Ex. 3).

The two *Missouri Municipal League* cases, *supra*, indicate that the sufficiency and fairness of the fiscal note summary is based on the contents of the fiscal note. To hold otherwise would undermine the process and allow opponents to lay in wait or "sandbag" until after the official ballot title has been approved and circulated for signatures.

The fiscal note summary in this case fairly, and without bias or favoritism, synopsizes the fiscal note in 50 words or less, excluding articles. § 116.175.3. The only issue the trial court had with the fiscal note summary is whether it reflected any consideration of 510 lenders.

The evidence shows, in fact, that the fiscal note and fiscal note summary considered the fiscal impact on 510 lenders. There is a reference in the fiscal note to 510 lenders as contained in an email message of the Division of Finance found at the end of Dr. Haslag's report. (Joint Ex. 3). However, the contents of this message were not submitted in the Department of Insurance, Financial Institutions and Professional Registration's official response to the Auditor's request for fiscal impact. (Joint Ex. 3 and Tr. 87). Since the Department of Insurance, Financial Institutions and Professional Registration is the parent body of the Division of Finance, (Tr. 26), the Department's response is the official response on behalf of the Division.

The Auditor's employee testified that he considered the Division of Finance's comments on impact on 510 lenders to have been evaluated and modified by the Department before they submitted the official fiscal impact submission from the Department. (Tr. 26-28, 87, 89). This is a reasonable conclusion, and Plaintiffs failed to show that such a conclusion is unreasonable. The fiscal note summary adequately and fairly summarized the fiscal note. The trial court, therefore, erred as a matter of law in finding otherwise, and its judgment should be reversed.

V. The Trial Court Erred in Entering Judgment that the Fiscal Note and Fiscal Note Summary are Insufficient and Unfair, Because There was No Substantial Evidence to Support the Judgment, In That the Opponents' Evidence Did Not Identify Any Lenders That Would be Affected by the Ballot Initiative Who Were Not Already Considered in the Fiscal Note and Fiscal Note Summary.

Despite the complexity of the issue, a 510 lender was never properly defined at trial. There is nothing in the record to establish that the judge, the witnesses, or the attorneys understood exactly what a 510 lender is or agreed on a common definition explaining what 510 lenders are included. Not only does the record not indicate an understanding or agreement by the parties of what a 510 lender is, but there was no testimony given by the

Plaintiffs' expert as to any specific type of 510 lender that would be affected by the ballot initiative that was not included in the fiscal note. Nor was there testimony about what percentage of 510 lenders that do not also provide payday or title loans and were therefore not included. (Tr. 171-217).

Of relevance is Dr. Durkin's testimony that "In general, I have a feeling for what 408.510 is, but I certainly wouldn't tell you that I know a whole lot about it or spent a lot of time looking at it." (Tr. 178). He also testified, "Now, I suspect--and I don't know if anybody knows, exactly what the distribution of companies is." (Tr. 187). And, he said, "I accepted someone's oral representation on approximately how many employees there are in the 510 industry." (Tr. 208).

Because of Dr. Durkin's indefinite and inconclusive testimony, there is no way to know whether or not fiscal impact information on any 510 lenders was excluded in the fiscal note and fiscal note summary. The testimony of the Auditor's employee, Jon Halwes, only indicates that the fiscal note did not include an independent analysis of the initiative petition's affects on 510 lenders as a whole. Halwes, however, did testify that the submission of the Department of Insurance, Financial Institutions and Professional Registration reflected its analysis as to the effect on 510 lenders. (Tr. 26-28, 87, 89).

The trial court erroneously considered Dr. Durkin's testimony since it did not provide substantial evidence outweighing the evidence showing that the fiscal note and fiscal note summary did contain fiscal impact evidence from the Department of Insurance on 510 lenders. Dr. Durkin did not provide specific, reliable information on who and how many of the 510 lenders, if any, were excluded from the Department of Insurance's analysis as submitted to the Auditor for inclusion in the fiscal note.

CONCLUSION

For the foregoing reasons, the Circuit Court's judgment holding the Secretary of State's summary statement insufficient and unfair, and then judicially re-writing the summary statement, should be reversed. Similarly, the Circuit Court's judgment holding the Auditor's fiscal note and fiscal note summary insufficient and unfair should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 10,256 words.

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